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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-806**

GULF OIL CORPORATION,
Petitioner,

v.

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY,
et al.

**CONDITIONAL-CROSS PETITION FOR
A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

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December 6, 1977

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**CONDITIONAL-CROSS PETITION FOR
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THE THIRD CIRCUIT**

Gulf Oil Corporation conditionally cross petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in its Case No. 77-1050 on September 7, 1977. Connecticut Public Utilities Control Authority, *et al.* ("New England Agencies"), petitioners below in that case, or intervenors below supporting them,¹ may petition this Court for a writ of certiorari as to certain

¹ Intervenors supporting New England Agencies' petition below in Third Circuit No. 77-1050 include Philadelphia Gas Works, Bay State Gas Company, *et al.*, and Public Service Electric and Gas Company.

issues raised by and resolved adversely to the New England Agencies. Gulf's conditional-cross petition for writ should be granted only if this Court issues a writ of certiorari which may be sought by New England Agencies or supporting intervenors.

This conditional-cross petition and any petition of New England Agencies are related to the case which is the subject of the petition for writ filed by Gulf on October 25, 1977 (No. 77-596). Gulf there seeks review of the judgment and opinion of the United States Court of Appeals for the Third Circuit entered September 7, 1977, in its Case No. 76-2596 as to certain issues decided adversely to Gulf, petitioner below in that case.²

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals, not yet reported, is reproduced in Appendix A to Gulf's petition for writ in No. 77-596, pp. 1a-58a.³ The opinions and orders of the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission) * styled Opinion Nos. 780 and 780-A, not yet reported, are printed in Appendix D and Appendix E, respectively, to Gulf's petition for writ in No. 77-596, pp. 67a-94a and 95a-116a. The order of the court of appeals dated September 26,

² The court of appeals consolidated Case Nos. 76-2596 and 77-1050 for purposes of argument and decision.

³ The Appendices to this Petition are designated as Appendix (A), Appendix (B), etc. The Appendices to Gulf's petition for writ in No. 77-596 are designated similarly but without parenthesis, e.g., Appendix A, Appendix B, etc. References to the three-volume Appendix in the court of appeals are to the volume and page number as used below (e.g., I App. —, II App. —, III App. —, etc.).

* On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission under the Natural Gas Act. Department of Energy Organization Act, 91 Stat. 565 (1977), 42 U.S.C. § 7101 Note. References to the "Commission" in this Petition are to both agencies.

1977 denying Gulf's motion and supplemental motion to dismiss New England Agencies' Petition for Review is not reported and is printed in Appendix (A), pp. 1a-2a. The order of April 11, 1977, of the court of appeals remanding Case No. 77-1050 to the Commission is not reported and is printed in Appendix (B), pp. 3a-4a. The order of May 10, 1977, of the Commission entitled "Order Granting Intervention *Nunc Pro Tunc*" is not reported and is printed in Appendix (C), pp. 5a-8a.

JURISDICTION

The judgment of the court of appeals was entered September 7, 1977 (Appendix C to Gulf's petition for writ in No. 77-596, pp. 63a-65a). The order of the court of appeals denying Gulf's timely petition for rehearing was entered September 26, 1977 (Appendix B to Gulf's petition for writ in No. 77-596, pp. 59a-62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Court of Appeals has jurisdiction to entertain a petition for review under Section 19(b) of the Natural Gas Act filed by persons not made "a party to the proceeding" when the record on which the orders sought to be reviewed was before the Commission;

2. Whether the Court of Appeals and the Commission have authority to make a person a "party" to proceedings under the Natural Gas Act retroactively and on a *nunc pro tunc* basis solely for the purpose of attempting to confer "standing" upon that person to seek judicial review and to create jurisdiction in the Court of Appeals to entertain a petition for review.

STATUTES INVOLVED

Sections 19(a) and (b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(a) and (b), are set forth in Appendix (D), pp. 9a-11a.

STATEMENT

Gulf respectfully refers the Court to the "Statement" in its petition for writ in No. 77-596, pp. 3-12, for a full discussion of facts leading up to the issuance by the Commission of Opinion Nos. 780 and 780-A and of the decision of the court of appeals. The following discussion supplements that "Statement" only as to facts pertinent to this conditional-cross petition:

1. On November 7, 1975, the Commission issued an order (I App. 196-200) directing Gulf to show cause why it should not be required to fulfill delivery obligations for the sale of natural gas to Texas Eastern Transmission Corporation under a 1963 certificate and 1964 contract (I App. 14-53, 54-68). The Commission ordered formal hearings before an Administrative Law Judge (ALJ) and directed that:

"Notice of intervention or petition to intervene in this proceeding may be filed with the Commission on or before November 26, 1975, in accordance with the Commission's Rules of Practice and Procedure (18 C.F.R. 1.8)." (I App. 199)

The date for such filing was later extended to December 5, 1975 (40 F.R. 56488, December 3, 1975). Hearings as to Gulf's contract with Texas Eastern were held in January and March, 1976.

Statements and evidence of certain intervenors prompted Gulf to seek a declaratory order from the Commission with respect to a theory of "damages" arising from alleged underdeliveries of gas by Gulf to Texas

Eastern (I App. 201-217). The Commission issued notice of Gulf's petition on March 2, 1976, and invited "any person desiring to be heard or to make any protest" to file a petition to intervene or a protest by March 19, 1976. The Notice stated (I App. 219):

"Any party wishing to become a party to a proceeding, or to participate as a party in any hearing therein, must file a petition to intervene in accordance with the Commission's Rules."

On August 13, 1976, the ALJ issued a decision finding Gulf in violation of the Natural Gas Act (I App. 237-264). The ALJ rejected the suggestion of some participants that Gulf be required to make monetary "refunds" to the ultimate consumers because of violations (I App. 257-258). Parties to the hearings filed briefs with the full Commission, and on October 15, 1976, the Commission issued its Opinion No. 780 (Appendix D to Gulf's petition for writ in No. 77-596, pp. 67a-94a). The Commission affirmed the ALJ's "finding" of Gulf's violation, but reversed as to refunds and ordered Gulf to compute and pay refunds under a formula set forth in the opinion (Appendix D to Gulf's petition for writ in No. 77-596, pp. 78a-80a).

2. On October 15, 1976, the date of issuance of the Commission Opinion, the Rhode Island Division of Public Utilities and Carriers, Rhode Island Attorney General, and the Rhode Island Consumer's Council filed with the Commission a joint petition for late intervention, seeking an order permitting their participation as a "party" in any future proceedings. On October 29, 1976, the Connecticut Public Utilities Control Authority and the Massachusetts Department of Public Utilities filed a "Notice of Intervention" seeking to be made a party and "to be heard" in any "future proceedings." The petition filed by the Rhode Island group and the Notice filed by Connec-

ticut and Massachusetts⁵ were both stamped on the first page with the following notation:

"This document is not filed within the time prescribed. It is accepted for filing conditionally."

On November 15, 1976, the New England Agencies and others filed a joint Application for Rehearing of Opinion No. 780 with the Commission (I App. 465-471).

On December 9, 1976, the Commission issued Opinion No. 780-A denying rehearing (I App. 504-528). This Opinion recited that the New England Agencies had filed an Application for Rehearing (I App. 504), discussed the substance of the New England Agencies' application (I App. 513, 516), but denied their application (I App. 527).

3. On December 9, 1976, Gulf filed a Petition for Review in the United States Court of Appeals for the Third Circuit (3d Cir. No. 77-2596). On January 10, 1977, the Connecticut Public Utilities Control Authority, *et al.* filed a Petition for Review of the same orders in the same court of appeals (3d Cir. No. 77-1050). Thereafter, in accordance with Section 19(b) of the Natural Gas Act, the Commission transmitted the Certificate of Record in Lieu of Record to the court of appeals on January 17, 1977, and that court then had exclusive jurisdiction as to the orders entered by the Commission.

Between October 15, 1976—the date upon which the Rhode Island group filed the Petition for Late Intervention—and January 17, 1977—the date upon which the jurisdiction of the court of appeals became exclusive—the Commission issued *no order authorizing* the participation of any of the New England Agencies and issued no order affecting the "conditional acceptance" of their petition and late notice.

⁵ Hereafter, these persons shall be collectively referred to as "New England Agencies."

4. Gulf intervened in the Third Circuit case instituted by the New England Agencies, Case No. 77-1050, and filed with the Court a "Motion to Dismiss for Lack of Jurisdiction" on March 11, 1977. Gulf argued that the Court lacked jurisdiction under Section 19(b) of the Natural Gas Act to entertain the New England's Agencies' Petition for Review because none were "parties" to the proceedings before the Commission as is required by that Section.

Gulf's Motion showed that the New England Agencies' filings to participate were untimely and were only "accepted conditionally." Gulf showed that the Commission failed to enter an order permitting the New England Agencies' participation pursuant to its rules, 18 C.F.R. § 1.8, and further, that the New England Agencies had recognized the fact the Commission had failed to grant them intervention as a "party." In their Petition for Review filed with the Third Circuit on January 10, 1977, the New England Agencies thus stated that the "Petitions for late intervention . . . are pending before the Commission. . . . New England believes that the F.P.C. will soon grant its petition"

Gulf's Motion noted that standing to seek judicial review of Commission orders is governed by Section 19(b) of the Act and is jurisdictional, citing *Public Service Commission of New York v. Federal Power Commission*, 284 F.d 200 (D.C. Cir. 1960); *Lynchburg Gas Co. v. Federal Power Commission*, 284 F.2d 756, 759 (3d Cir. 1960); *Utility Users League v. Federal Power Commission*, 394 F.2d 16, 19 (7th Cir. 1968); and *State of Wisconsin v. Federal Power Commission*, 292 F.2d 753, 754 (D.C. Cir. 1961). Gulf thus argued that the New England Agencies did not meet the statutory requirement of "party to a proceeding."

The New England Agencies responded to Gulf's Motion, conceding that the Commission did not act on their

untimely petitions for late intervention, but noted also that the Commission merely failed to grant them. The New England Agencies suggested that the Court remand its Case No. 77-1050 for a limited ruling on the petition and notice of late intervention.

5. On April 11, 1977, the court issued an order (Appendix (B), pp. 3a-4a) directing that the New England Agencies' petition

"... shall remain on the Court docket, subject to a limited remand to the Federal Power Commission to afford it an opportunity within 30 days from the date of this order to enter an order either granting petitioners intervenor status *nunc pro tunc* or denying them such status or to take such other actions as it deems appropriate."

On May 10, 1977, on remand, the Commission issued an order permitting the New England Agencies to intervene in proceedings *nunc pro tunc* "as of the time the record was before the Commission and before the filing of applications for rehearing of Opinion No. 780" (Appendix (C), pp. 5a-8a). The order stated that the Commission had "treated New England as an intervenor in that it accepted New England's application for rehearing" and that in any event, it was "entirely appropriate" to grant intervention "acting under the mandate of the Court" (Appendix (C), p. 7a). The Commission's order was transmitted to the Court for its consideration.

6. Thereafter on May 19, 1977, Gulf filed with the Court a supplement to its Motion to Dismiss. Gulf argued that the Commission's *nunc pro tunc* entry did not cure the jurisdictional defect of the New England Agencies' petition for review and that the Court must dismiss the

* Gulf sought rehearing of the Court's order of April 11, 1977, arguing that a jurisdictional defect could not be cured by action of the Commission as apparently contemplated by the Court's order. Gulf's Petition for Rehearing was denied by order of May 2, 1977.

petition. Gulf showed that Sections 19(a) and (b) of the Natural Gas Act prescribe unalterable, statutory requirements as to the court's jurisdiction and standing, and that New England did not meet these requirements at the time its Petition was filed. Further, Gulf showed that an entry *nunc pro tunc* may not supply an entire omission to act and that by giving effect to the Commission's entry *nunc pro tunc*, the Natural Gas Act would be unlawfully "amended" with respect to the prerequisites for review of Section 19(b).

During argument on June 7, 1977, the court noted that New England Agencies' argument was being presented subject to the court's subsequent action on Gulf's Motion to Dismiss. The court's opinion, issued September 7, 1977 (Appendix A to Gulf's petition for writ in No. 77-596, pp. 1a-58a), addressed arguments presented by New England Agencies, but did not dispose of Gulf's Motion. Thereafter, by order of September 26, 1977 (Appendix (A), pp. 1a-2a), the court issued an order denying Gulf's Motion to Dismiss as of September 7, 1977.

REASONS THAT THE WRIT SHOULD ISSUE

I. The Court of Appeals' Ruling Is in Conflict with the Express Statutory Requirements as to "Standing" to Seek Judicial Review and as to the Jurisdiction of the Court of Appeals Under the Natural Gas Act

The court of appeals has issued a final order denying Gulf's Motion to Dismiss a petition for review filed under Section 19(b) of the Natural Gas Act by one not made "a party" to the proceedings when the record upon which the orders were issued was before the Commission. Implicit in the court's ruling is a misconstruction of Section 19(b) of the Act as to the *jurisdictional requisite* for seeking judicial review. The court's failure to dismiss the New England Agencies' petition for review upon grounds that the statutory requirement for standing had

not been met disregards the explicit and binding language of that Section, and implicitly, but erroneously, confers upon itself authority to prescribe permissive "standing" to seek judicial review of Commission action. The court's ruling thus presents questions of importance under the Natural Gas Act as to jurisdiction of the courts to review orders entered under that statute.

Section 19(b) of the Act prescribes in pertinent part:

"Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of said order in the court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or part. . . ."

The Natural Gas Act is clear that review may be sought only by a "party to a proceeding." This statutory language is unambiguous in requiring that *proper* petitioners are only those made a party by the Commission below in timely fashion.⁷

Section 19(b) further provides that upon the filing with the Court of the Commission's record, the court's jurisdiction is exclusive as to the orders on which review is sought. In this instance, the Commission's record was certified to the court on January 17, 1977. As of that date, however, the New England Agencies had *never* been made a "party" to the proceedings in which the

⁷ "Party" is not defined in the Act or the Commission's Rules and Regulations. "Intervenor", however, is defined in Section 1.1(f)(13) of the Rules, 18 C.F.R. § 1.1(f)(13), as "persons petitioning to intervene . . . when admitted as a participant, . . . and State Commissions giving notice of intervention as provided in" Section 1.8. (Emphasis added).

orders were issued. Thus, the Commission had *no* further jurisdiction to entertain the New England Agencies' untimely petitions for intervention.

However, after the filing of Gulf's Motion to Dismiss, the court remanded its Case No. 77-1050 to the Commission in order to permit the Commission to act upon the New England Agencies' late petition and notice of intervention (Appendix (B), pp. 3a-4a). The Commission then permitted the New England Agencies to intervene *nunc pro tunc* as of the time the record was before it (Appendix (C), pp. 5a-8a), and the court subsequently denied Gulf's Motion to Dismiss (Appendix (A), pp. 1a-2a). Such actions were clearly improper.

Under Section 19(b), the court's *jurisdiction* attaches *only* when a timely petition for review is filed by an aggrieved "party to the proceeding" below. The New England Agencies were not a "party" when the petition for review was filed in the court of appeals, or on any day during the 60-day period during which a timely, proper and lawful petition for review could have been filed under Section 19(b) of the Act. Consequently, the court of appeals never had jurisdiction over the petition for review filed by the New England Agencies, and the only proper course of action was dismissal of the petition. See, *Gage v. Atomic Energy Commission*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973); *Public Service Commission of New York v. Federal Power Commission*, 284 F.2d 200 (D.C. Cir. 1960); *Panhandle Eastern Pipeline Company v. Federal Power Commission*, 343 F.2d 905, 908 (8th Cir. 1965).

The "party" and "time" requirements of Section 19(b) are statutory and cannot be waived, modified, or suspended. Here, however, giving effect to the *nunc pro tunc* order of the Commission purports to waive the "party" requirements and to waive the time requirement. Such is unlawful and impermissible. Moreover, the concept of an

entry *nunc pro tunc* is misapplied in this instance. An order *nunc pro tunc* makes the record speak the truth, and may not supply an action that was never taken.^{*} Thus, a *nunc pro tunc* order may not cure a jurisdictional defect.

The court of appeals' ruling thus improperly circumvents the provisions of Section 19(b) of the Natural Gas Act as to standing to seek judicial review and as to jurisdiction of the court. By failing to dismiss, the court of appeals unlawfully extends permissive judicial review to petitioners which Congress, in enacting the Natural Gas Act, did not intend. This case thus presents a major question as to standing and court of appeals' jurisdiction under the Natural Gas Act, and a jurisdictional question that must be resolved before the merits of any petition as to Case No. 77-1050 below could be considered by this Court.

II. The Ruling of the Court of Appeals Conflicts with Construction of Section 19(b) of the Act by the District of Columbia Circuit

The court of appeals' denial of Gulf's Motion to Dismiss is in direct conflict with the holding of the United States Court of Appeals for the District of Columbia in *Public Service Commission of New York v. Federal*

^{*} This is black letter law. See, e.g., *Gagnon v. United States*, 193 U.S. 451, 457 (1904) ("... This power to amend, too, must not be confounded with the power to create . . ."); *Wax v. Motley*, 510 F.2d 318 (2d Cir. 1975); *Matthies v. Railroad Retirement Board*, 341 F.2d 243 (8th Cir. 1965); 21 C.J.S. *Courts* § 227 ("... It is not, on the other hand, the function of such entry by a fiction to antedate the actual performance of an act which never occurred; or to supply an entire omission to act within the time limit for such action . . ."); 46 Am. Jur. 2d *Judgments* § 201 ("The general rule is that an amendment of the record of a judgment, and a *nunc pro tunc* entry thereof, may not be made . . . to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide . . .").

Power Commission, 284 F.2d 200 (1960). In that case, the Commission had denied the New York Commission's petition to intervene in proceedings before it. Months later, the New York Commission sought to file a petition for review under Section 19(b) as to the merits of a later decision in the proceedings. The District of Columbia Circuit dismissed the petition for review:

"We are of the opinion that a would-be intervenor whose application to intervene has been denied is not a party to the full proceeding upon the merits and is not aggrieved, within the statutory meaning, at the time or upon the occasion of the entry of the final order by the Commission upon the merits. Such a person has not been a party to the proceeding upon the merits. He has not participated in the making of the record upon which such a final order is predicated." 284 F.2d at 204 (Footnotes omitted).

The same result should have been reached in this case. New England did *not* participate in the making of the record below and was *never* made a party to the proceeding upon the merits under procedures permitted by the Act. They remain, at best, "would-be intervenors." This, however, is not sufficient to meet the statutory requirement of "party to a proceeding." The holding of the Third Circuit thus conflicts squarely with the holding of the District of Columbia Circuit in applying Section 19(b).

The District of Columbia Circuit recognized that *dismissal* is the *only* appropriate action a Court of Appeals may take when a statute prescribes *who* may seek review and *when* the Court's jurisdiction may be invoked. Moreover, in *Gage v. Atomic Energy Commission*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973), the court also dismissed, under a similar statute, a petition filed by persons who had actual knowledge of ongoing agency proceedings but remained uninvolved until the filing seeking

review in the court of appeals. The court was compelled to dismiss the petition:

"This petition for review was brought pursuant to the Act of 29 December 1950, which grants the Court of Appeals 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of . . . all final orders of the Atomic Energy Commission made reviewable by Section 2239 of title 42.' *Jurisdiction may be invoked* by the filing of a petition, under 28 U.S.C. § 2344, by 'any party aggrieved by the final order.' (Emphasis added). Since petitioners were never parties to the rule-making proceedings, this court simply does not have jurisdiction over their claim."

Thus, under the procedures employed by the Third Circuit in permitting intervention by the New England Agencies, a petitioner *not* granted timely intervention by the Commission could seek and obtain review of the *merits* of the orders issued by the Commission. However, the same petitioner, filing in the District of Columbia Circuit, would be barred from judicial review under that court's construction of Section 19(b) and under the principles of the *Public Service Commission of New York* and *Gage* cases. Thus, this conflict in constructions of Section 19(b) as to standing and the proper role for the court of appeals warrants review and resolution by this Court, if this Court should entertain any questions raised in No. 77-1050 below.

CONCLUSION

For the foregoing reasons, this Conditional-Cross Petition for Writ of Certiorari should be granted if this Court issues a writ which may be sought by the New England Agencies or supporting intervenors as to the Third Circuit's opinion in its Case No. 77-1050.

Respectfully submitted,

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December 6, 1977

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APPENDICES TO

**CONDITIONAL-CROSS PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

1a

APPENDIX (A)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 5, 1977

No. 72-2596 and 77-1050

(FPC No. CI 64-26)
No. 76-2596

GULF OIL CORPORATION,
Petitioner

vs.

FEDERAL POWER COMMISSION
PHILADELPHIA GAS WORKS, ET AL.,
Intervenors

(FPC No. CI 64-26)
No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY,
ET AL.,
Petitioners

vs.

FEDERAL POWER COMMISSION
PHILADELPHIA GAS WORKS, ET AL.,
Intervenors

Present: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*.

1. Motion by Gulf Oil Corporation, petitioner in 76-2596 and intervenor in 77-1050 to dismiss the petition for review in No. 77-1050 for lack of jurisdiction, with Appendix in support of motion to dismiss attached,

2a

2. Response by petitioners in 77-1050 in opposition to motion of petitioner's in 76-2596 to dismiss for lack of jurisdiction, in the above-entitled cases.

Respectfully

/s/ T. F. Quinn
T. F. QUINN, Clerk

ags

Encl.

The foregoing Motion and the supplemental Motion filed on May 19, 1977, are denied nunc pro tunc as of September 7, 1977.

By the Court,
/s/ Max Rosenn
Circuit Judge

Dated: September 26, 1977

3a

APPENDIX (B)

UNITED STATES OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1050

CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY,
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES,
RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND
CARRIERS, RHODE ISLAND ATTORNEY GENERAL,
RHODE ISLAND CONSUMERS' COUNCIL,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

GULF OIL CORPORATION,
PHILADELPHIA GAS WORKS, ET AL.,
Intervenors.

ORDER

PRESENT: SEITZ, *Chief Judge*, ALDISERT and
ROSENN, *Circuit Judges*.

The intervenor, Gulf Oil Corporation, having moved to dismiss the petition for review for lack of jurisdiction, it is

ORDERED that the petition shall remain on the court docket, subject to a limited remand to the Federal Power Commission to afford it an opportunity within 30 days

from the date of this order to enter an order either granting petitioners intervenor status *nunc pro tunc* or denying them such status or to take such other action as it deems proper.

Any supplemental Commission action shall be certified to this court as a supplement to the record within 30 days from the date of this order.

This order is without prejudice to the resolutions, if necessary, of any issues now or hereafter presented to the court.

By the Court,
/s/ Seitz
Chief Judge

DATED: April 11, 1977

APPENDIX (C)

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III, and James G.
Watt.

Docket No. CI64-26

GULF OIL CORPORATION

and

TEXAS EASTERN TRANSMISSION CORPORATION

ORDER GRANTING INTERVENTION NUNC PRO TUNC

(Issued May 10, 1977)

The United States Circuit Court of Appeals for the Third Circuit in *Gulf Oil Corporation v. F.P.C.*, No. 76-2596 on April 11, 1977, issued an order remanding the above proceedings to this Commission to afford it an opportunity within 30 days from the order to enter an order either granting New England¹ intervenor status *nunc pro tunc* or denying them such status, or to take such other action as it deems appropriate.

On April 22, 1977, New England filed with the Commission its motion for expedited consideration for leave to intervene. On the same day, Gulf filed a statement of position in which it argued that the Commission is without authority to permit New England to intervene *nunc*

¹ The Connecticut Public Utilities Control Authority, the Massachusetts Department of Public Utilities, the Rhode Island Division of Public Utilities and Carriers, the Rhode Island Attorney General, and the Rhode Island Consumers' Council (New England).

pro tunc because the Commission had failed to enter any order permitting New England's participation when the record was before it. Further, Gulf says, a *nunc pro tunc* order is intended to make the record speak the truth, but may not be used to supply an action that was never taken.

In a response filed May 2, 1977, New England argues that the Commission should go no further than to settle the question that has been remanded and that Gulf's contentions and legal arguments should be made before the Third Circuit. New England also argues that it should be granted intervenor status because distribution companies in Connecticut, Massachusetts, and Rhode Island are supplied with gas from Algonquin Gas Transmission Company which is solely supplied by Texas Eastern Transmission Corporation, which, in turn, receives gas from Gulf Oil. Further, New England's interest in these proceedings is not adequately represented by any other party.

In our opinion New England should be granted intervention *nunc pro tunc*, for it has made a good cause showing that it should be an intervenor. It represents an area served with gas from Gulf Oil. Its several members applied for intervention in October of 1976,² but the Commission never formally acted upon the applications. However, the applications should not be deemed denied by the passage of time since the rules impose no such limitation on the Commission. Section 1.8(f)(2) of the

² The application for intervention filed by Julius Michaelson, Attorney General of Rhode Island, the Rhode Island Division of Public Utilities and Carriers, and the Rhode Island Consumers Council was filed on October 15, 1976, and was within the period specified in Paragraph (H) of the order in Opinion No. 780, issued October 15, 1976. The Connecticut Public Utilities Control Authority and the Massachusetts Department of Public Utilities filed their Notice of Intervention on October 29, 1976, not within the 10-day period specified by Opinion No. 780.

Commission's Rules provides merely that the Commission will take action as soon as practicable after the expiration of the time for filing answers. New England is not therefore in the position of the New York Commission in *Public Service Commission of New York v. F.P.C.*, 284 F.2d 200 (CAD-1960), cited by Gulf, where that Commission was denied intervention and failed to make timely application for review.

In fact, the Commission treated New England as an intervenor in that it accepted New England's application for rehearing filed November 15, 1976, discussed its argument, and denied its application for rehearing in Opinion No. 780-A, issued December 9, 1976. Thus the Commission has already, for practical purposes granted it intervention. In any case the Commission was charged by the Court of Appeals with determining whether to grant or deny intervention *nunc pro tunc*. Here we determine that, if New England was not already granted intervention by Opinion 780-A, it is entirely appropriate that we do so now acting under the mandate of the Court. Further, because of the events related above, particularly the treatment of New England as an intervenor, and New England's use of the gas that is being purchased from Gulf, we have no difficulty in finding under Section 1.8(d) of our Rules that in extraordinary circumstances and for good cause shown, New England should be permitted to intervene even though the filing made in October 1976 was not timely.

The Commission further finds:

It is in the public interest that New England be permitted to intervene in this proceeding *nunc pro tunc* and to do so even though its filings were not timely because of extraordinary circumstances and for good cause shown.

The Commission orders:

New England is permitted to intervene in these proceedings *nunc pro tunc* as of the time the record was before the Commission and before the filing of applications for rehearing of Opinion No. 780, subject to the rules and regulations of the Commission: *Provided, however*, that the participation of such interveners shall be limited to matters affecting asserted rights and interests as specifically set forth in said petitions for leave to intervene; and *Provided further*, that the admission of such interveners shall not be construed as recognition by the Commission that they or any of them might be aggrieved because of any order or orders of the Commission entered in this proceeding.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX (D)

NATURAL GAS ACT

PUBLIC—No. 688—75TH CONGRESS
CHAPTER 556—3D SESSION

* * * *

SEC. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any

circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the

original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

* * * *